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No. _____

In the Supreme Court of the United States
October Term, 1995

The Sherwin-Williams Company,
Cross-Petitioner,

v.

Central States, Southeast and
Southwest Areas Pension Fund,
Cross-Respondent.

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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62pp

QUESTION PRESENTED

A former subsidiary of Respondent and Cross-Petitioner, The Sherwin-Williams Company ("Sherwin-Williams") ceased making contributions on behalf of its employees to Petitioner and Cross-Respondent, Central States, Southeast and Southwest Areas Pension Fund ("Central States"). However, at least one other of Sherwin-Williams' subsidiaries continued making contributions to Central States. As a result of such cessation of contributions, Central States assessed Sherwin-Williams for *complete* withdrawal liability, pursuant to the withdrawal liability provisions of the Employee Retirement Income Security Act of 1974, as amended by the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §1381-1405. Sherwin-Williams disputed the assessment through statutorily mandated arbitration, and an arbitrator found that the assessment was improper. Central States filed a complaint in the district court below, attempting to have the arbitrator's decision modified or vacated; and Sherwin-Williams filed a complaint to enforce the arbitrator's decision. The district court enforced the arbitrator's decision. Still refusing to accept the arbitrator's decision, Central States appealed to the Seventh Circuit, which affirmed that the assessment was improper. At each stage, Sherwin-Williams sought attorneys' fees, but the arbitrator and the courts denied the requests.

Thus, Sherwin-Williams petitions this court for a writ of certiorari to address the following issue:

What is the appropriate standard that a court is to apply in determining whether an employer is entitled to attorneys' fees incurred as a result of a multiemployer pension fund's improper assessment of withdrawal liability and refusal to accept an arbitrator's decision that the fund's assessment of liability was contrary to law?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Respondent and Cross-Petitioner, The Sherwin-Williams Company, states that it has no parent company and its subsidiaries (other than wholly-owned subsidiaries) are:

John's Color Wheel, Inc. (60% subsidiary)
Kaney Paints, Inc. (60% subsidiary)
Heritage Paint and Decorating, Inc. (60% subsidiary)
American Standox, Inc. (50% ownership)

TABLE OF CONTENTS

QUESTION PRESENTED i

RULE 29.6 STATEMENT iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND REGULATIONS INVOLVED . 1

STATEMENT OF THE CASE 2

SUMMARY OF REASONS FOR GRANTING THE WRIT 6

REASONS FOR GRANTING THE WRIT 8

I. The Decision Below Conflicts with All Other Circuits That Have Decided the Same Issue . 8

II. The Need for A Uniform Standard Is Important 12

III. The Decision Below Was Wrong 16

A. The Five Factor Test is a Better Standard 17

B. Sherwin-Williams is Entitled to Attorneys' Fees Based on an Application of the Five Factor Test 19

C. The Courts Below Erred in Finding That Central States' Position was Substantially Justified 25

CONCLUSION 26

APPENDIX A1

28 U.S.C. § 1254(1) A3

29 U.S.C. § 1001a A4

29 U.S.C. § 1132(g) A6

29 U.S.C. § 1383(a) A8

29 U.S.C. § 1401(b) A9

29 U.S.C. § 1451 ..... A10

Santa Fe Pacific Corporation v. Central States, Southeast and Southwest Areas Pension Fund, No. 92 C 0677, 1992 U.S. Dist. Lexis 15159 (N.D. Ill. October 6, 1992). A11

TABLE OF AUTHORITIES

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Anita Founds. v. ILGWU Nat'l Retirement Fund,
902 F.2d 185 (2d Cir. 1990) 9, 17, 23

Armistead v. Vernitron Corp.,
944 F.2d 1287 (6th Cir. 1991) 12

Bittner v. Sadoff & Rudoy Industries,
728 F.2d 820 (7th Cir. 1984) 10, 18, 25

Carpenters S. Cal. Admin. Corp. v. Russell,
726 F.2d 1410 (9th Cir. 1984) 19

Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.,
813 F.2d 760 (6th Cir. 1987) 9

Central States, Southeast & Southwest Areas Pension Fund v. Sherwin-Williams Co.,
71 F.3d 1338 (7th Cir. 1995) 10

Cowden v. Montgomery County Soc'y for Cancer Control,
653 F. Supp. 1072 (S.D. Ohio 1986) 22

Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.,
25 F.3d 743 (9th Cir. 1994) 9, 20, 23

Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension Trust Fund, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988) 9

Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund, 799 F.2d 45 (3rd. Cir. 1986) 11

Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978) 8-10, 16

Eddy v. Colonial Life Ins. Co. of Am., 59 F.3d 201 (D.C. Cir. 1995) 18

Evans v. Bexley, 750 F.2d 1498 (11th Cir. 1985). 9

Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan, 768 F. Supp. 728 (C.D. Cal. 1991) 24

Farris v. Century Planners, Ltd., 858 F. Supp. 150 (D. Kan. 1994) 20

Firestone Tire and Rubber Co. v. Neusser, 810 F.2d 550 (6th Cir. 1987) 9

Fort Halifax Packing Co. v. Coyne, 482 U.S 1 (1987) 13, 14

Freeman v. Continental Ins. Co., 966 F.2d 1116 (11th Cir. 1993) 18

Gordon v. United States Steel Corp.,
724 F.2d 106 (10th Cir. 1983) 9

Grand Union Co. v. Food Employers Labor Relations Ass'n,
808 F.2d 66 (D.C. Cir. 1987) 22

Gray v. New England Tel. & Tel. Co.,
792 F.2d 251 (1st Cir. 1981) 9-11, 17

Hogan v. Kraft Foods, Inc.,
969 F.2d 142 (5th Cir. 1992) 9

Hoover v. Armco, Inc.,
915 F.2d 355 (8th Cir. 1990),
cert. denied, 499 U.S. 961 (1991) 9

Hummel v. S.E. Rykoff & Co.,
634 F.2d 446 (9th Cir. 1980) 12, 22, 24

Iron Workers Local # 272 v. Bowen,
624 F.2d 1255 (5th Cir. 1980) 12, 18

McDonald v. Schweiker,
726 F.2d 311 (7th Cir. 1983) 10

Monkelis v. Mobay Chem.,
827 F.2d 935 (3d Cir. 1987) 9

Paddack v. Morris,
783 F.2d 844 (9th Cir. 1986) 22

Peick v. Pension Benefit Guaranty Corp.,
539 F. Supp. 1025 (N.D. Ill. 1982),
aff'd, 724 F.2d 1247 (7th Cir. 1983),
cert. denied, 467 U.S. 1259 (1984) 13

Quesinberry v. Life Ins. Co.,
987 F.2d 1017 (4th Cir. 1993) (*en banc*) 18

*Rootberg v. Central States Southeast &
Southwest Areas Pension Fund*,
856 F.2d 796 (7th Cir. 1988) 10, 12

*Santa Fe Pacific Corporation v.
Central States, Southeast &
Southwest Areas Pension Fund*,
1992 U.S. Dist. Lexis 15159 (N.D. Ill. 1992),
rev'd, 22 F.3d 725 (7th Cir.),
and cert. denied, 130 L. Ed. 2d 396 (1994) 20

Schetter v. Prudential-Bache Sec., Inc.,
695 F. Supp. 1077 (E.D. Cal. 1988) 23, 24

*Shelter Framing Corp. v. Pension
Benefit Guaranty Corp.*,
705 F.2d 1502 (9th Cir. 1983),
*rev'd on other grounds, sub nom.,
Pension Benefit Guaranty Corp. v.
R. A. Gray & Co.*,
467 U.S. 717 (1984) 13

*Trustees of Central States, Southeast &
Southwest Areas Pension Fund v.
Golden Nugget, Inc.*,
697 F. Supp. 1538 (C.D. Cal. 1988) 19, 21, 23, 24

United States v. Williams,
504 U.S. 36 (1992) 16

Van Boxel v. Journal Co. Employees Pension Trust,
836 F.2d 1048 (7th Cir. 1987) 11

Vintilla v. United States Steel Corp.
Plan for Employee Pension Benefits,
642 F. Supp. 295 (W.D. Pa. 1986),
aff'd, sub nom., Appeal of Ayo,
815 F.2d 693 (3d Cir.),
and aff'd, sub nom., Appeal of Campbell,
815 F.2d 693 (3d Cir.),
and aff'd, 815 F.2d 697 (3d Cir.),
cert. denied, sub nom., Belak v.
United States Steel Corp. Plan
for Employee Pension Benefits,
484 U.S. 847 (1987) 22, 24

Statutes and Regulations

28 U.S.C. §1254(1) 1

28 U.S.C. §2412(d)(1)(A) 17

29 C.F.R. §2641.9(c) 4

29 U.S.C. §1001a(c)(1) 1, 15

29 U.S.C. §1001a(c)(2) 1, 13, 15

29 U.S.C. §1002(37) 2

29 U.S.C. §1132(g) 1, 9, 10, 12

29 U.S.C. §1132(g)(1) 11

29 U.S.C. §1301(a)(3) 2

29 U.S.C. §§1381-1405 2

29 U.S.C. §1383(a) 1, 19

29 U.S.C. §1385(a)(1) 4

29 U.S.C. §1398 20

29 U.S.C. §1399(b)(2) 3

29 U.S.C. §1401(a) 3, 4

29 U.S.C. §1401(a)(2) 4

29 U.S.C. §1401(b) 1, 15

29 U.S.C. §1451(d) 1, 16

29 U.S.C. §1451(e) 1, 8, 9-10, 12, 18

29 C.F.R. §2641.9(c) 4

Texts

Alan P. Woodruff, *Attorneys' Fees Under ERISA*, 67 Fla. B.J. 24 (August 1993) 18

David E. Gordon and Robert N. Eccless, *ERISA Attorney's Fees: an Unpredictable Situation*, 6 No. 10 Inside Litig. 17, October 1992 10

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OPINIONS BELOW

The decision of the court below is reported at 71 F.3d 1338 and is reproduced in Appendix A to the Petition for Writ of Certiorari, pp. 1a-11a. The decision of the district court is reported at 879 F. Supp. 867 and is reproduced in Appendix B to the Petition for Writ of Certiorari, pp. 12a-32a. The decision of the arbitrator in Case No. 51-621-0009-91 (American Arbitration Association, Chicago Regional Office) (Sept. 12, 1994) is reproduced in Appendix C to the Petition for Writ of Certiorari, pp. 33a-44a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 14, 1995. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and United States Supreme Court Rule 12.5. The petition for writ of certiorari, in connection with which this cross-petition is filed, was docketed on March 13, 1996.

STATUTES AND REGULATIONS INVOLVED

The texts of the following relevant statutes are set forth in the Appendix:

28 U.S.C. §1254(1)
29 U.S.C. §1001a(c)(1)
29 U.S.C. §1001a(c)(2)
29 U.S.C. §1132(g)
29 U.S.C. §1383(a)
29 U.S.C. §1401(b)(2)
29 U.S.C. §1451(d)
29 U.S.C. §1451(e)

STATEMENT OF THE CASE

This case arises under the withdrawal liability provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. §§1381-1405.

From 1987 until 1990, Respondent and Cross-Petitioner, The Sherwin-Williams Company ("Sherwin-Williams") owned three companies (Lyons Transportation Lines, Inc., Terminal Garage and Dupli-Color Products Co.) that contributed to Petitioner and Cross-Respondent Central States, Southeast and Southwest Areas Pension Fund ("Central States"), a multiemployer pension plan within the meaning of 29 U.S.C. §1002(37) and §1301(a)(3). On or about June 1, 1990, Sherwin-Williams sold the stock of Lyons Transportation Lines, Inc. ("Lyons") to JRC Acquisition Corp. ("JRC") for bona fide business reasons. After the sale, Lyons began to encounter numerous problems, which ultimately resulted in its demise. On October 12, 1990, Lyons ceased making contributions to Central States; and on October 19, 1990, Lyons and JRC filed Chapter 11 bankruptcy proceedings.

Pension contributions for the two covered employees at the Terminal Garage were made for most of 1990. However, by correspondence dated November 27, 1990, almost six months after Sherwin-Williams' sale of Lyons, subsequent to Lyons' Chapter 11 filing and cessation of contributions, counsel for the local union representing employees of Terminal Garage notified the National Labor Relations Board that it was disclaiming interest in serving as the collective-bargaining representative of the two union drivers employed by Terminal Garage.

Thereafter, Terminal Garage ceased making contributions to Central States. The other company, Dupli-Color, is still owned by Sherwin-Williams and still contributes to Central States.

By correspondence dated January 16, 1991, Central States assessed Sherwin-Williams for a complete withdrawal of Lyons. Central States also informed Sherwin-Williams that the demand applied to all members of any commonly controlled group of trades or businesses which included Lyons. Thus, despite the fact that Dupli-Color continued to contribute to Central States, Sherwin-Williams paid a total of $1,988,989.62 to Central States pursuant to its assessment.

By letter dated March 1, 1991, and pursuant to 29 U.S.C. §1399(b)(2), Sherwin-Williams requested Central States to review the assessment, in part because a complete withdrawal could not have occurred while other members of the Sherwin-Williams controlled group continued to contribute to Central States. Central States did not timely respond to Sherwin-Williams, and on August 27, 1991, Sherwin-Williams exercised its option under 29 U.S.C. §1401(a) to request arbitration of the assessment. Five months later, Central States informed Sherwin-Williams that the request for review was denied. By letter dated April 21, 1993 to Sherwin-Williams, Central States assessed Sherwin-Williams additional withdrawal liability in the amount of $1,327,077.44 attributable to a 1990 partial withdrawal due to cessation of Terminal Garage's contributions, which computation included the contribution history of Lyons and in this regard was duplicative of the first assessment.

By letter dated April 20, 1995, Central States assessed Sherwin-Williams additional withdrawal liability in the amount of $336,374.61 due to a 70% contribution decline pursuant to 29 U.S.C. §1385(a)(1). This assessment again took into consideration the contribution history of Lyons and provided a partial credit relating to Central State's second assessment.

At the arbitration hearing, Sherwin-Williams argued that 1) it could not be liable for a *complete* withdrawal because other members of its controlled group continued to contribute to Central States, and 2) it was entitled to recover attorneys' fees and costs pursuant to 29 U.S.C. §1401(a)(2) and 29 C.F.R. §2641.9(c). On September 12, 1994, the arbitrator held that under no circumstances could Sherwin-Williams be liable for a complete withdrawal of Lyons since other members of the Sherwin-Williams controlled group continued to contribute to Central States. Further, the arbitrator determined that each party would be responsible for its own attorneys' fees and costs and for half of the arbitrator's fee.

Central States, however, did not accept the arbitrator's decision which required Central States to return to Sherwin-Williams the nearly $2 million assessment which it had collected. On October 7, 1994, Central States filed a complaint to modify or vacate the arbitrator's award. On the same date, Sherwin-Williams filed a complaint to enforce the arbitrator's decision to return the assessment monies to Sherwin-Williams and to modify the decision regarding attorneys' fees. Sherwin-Williams also sought recovery of the attorneys' fees incurred as a result of Central States' refusal to accept the arbitrator's award.

On March 15, 1995, the United States District Court for the Northern District of Illinois held that Sherwin-Williams was not liable for a complete withdrawal of Lyons. In addition, the court held that Sherwin-Williams was not entitled to attorneys' fees and costs incurred in connection with either the arbitration or the proceedings before the district court.

Once again, Central States refused to accept a decision which required it to return the assessment monies, and it appealed the district court's decision to the Seventh Circuit. Faced with another round of legal battles, Sherwin-Williams cross-appealed the aspect of the decision denying attorneys' fees and costs. Sherwin-Williams also sought the attorneys' fees and costs incurred as a result of the appeal. The Seventh Circuit affirmed the decision of the district court as to the merits and attorneys' fees issues, but did not expressly rule on Sherwin-Williams' request for attorneys' fees incurred in connection with the Seventh Circuit appeal.

On March 13, 1996, five years after it began collecting its improper assessment, Central States filed a petition for a writ of certiorari in yet another attempt to avoid the arbitrator's decision. In response, Sherwin-Williams files a conditional cross-petition for writ of certiorari, asking this Court to review the lower courts' decisions denying Sherwin-Williams the attorneys' fees and costs which it has incurred in connection with the proceedings before the district court and the Seventh Circuit. Sherwin-Williams is not requesting this Court to review the decisions denying Sherwin-Williams the attorneys' fees and costs which it incurred in connection with the arbitration.

SUMMARY OF REASONS FOR GRANTING THE WRIT

In deciding whether to award attorneys' fees to employers that prevail in multiemployer pension plan withdrawal liability actions, the circuit courts have developed three different and conflicting standards. The most widely accepted standard, adopted by the Second, Sixth and Ninth Circuits, involves an analysis of five factors. The Third Circuit awards attorneys' fees to a prevailing employer in a MPPAA suit only if the claim against the employer was frivolous, unreasonable, or without foundation. The Seventh Circuit applies another unique standard and awards attorneys' fees only if the position of the losing party was not "substantially justified." This Court should resolve the conflict that exists among the circuits.

In part, Congress enacted ERISA for the purpose of creating a uniform federal law regulating employee pension funds. By applying a standard unlike that applied by any other circuit court, the Seventh Circuit thwarted Congress' intent to promote the growth and stability of multiemployer pension funds by helping employers, administrators, fiduciaries and participants predict the legality and impact of proposed actions without the necessity of reference to varying standards. The decision below, therefore, harms not only Sherwin-Williams but also the very system of laws Congress created for the benefit of all parties involved with employee pension funds. This Court should address this important inconsistency in the federal law.

Finally, although the "substantially justified" standard is well-established in the Seventh Circuit, this Court

should reverse that precedent and require the Seventh Circuit to follow the five-factor analysis used in all but one of the other circuits that have addressed the issue. The five factor analysis offers courts the flexibility necessary to exercise discretion consistent with fostering the goals of ERISA, in general, and MPPAA, in particular. The Seventh Circuit's stream-lined approach is unduly restrictive and fails to accommodate all of the ERISA and MPPAA concerns. It does not address issues of deterrence or even benefit to pension fund participants.

Application of the five-factor standard would militate in favor of awarding attorneys' fees to Sherwin-Williams. The use of the five factor standard, a reasonable and predictable approach to awarding attorneys' fees, will deter a multiemployer fund from using the power of MPPAA to unduly harass or burden employers with speculative or bad faith litigation. Furthermore, the integrity of the MPPAA mandated arbitration process will be protected by ensuring the cost and time efficient resolution of disputes between employers and pension funds.

Even under the Seventh Circuit's own standard, however, the courts below reached erroneous decisions. They held that because Central States raised "novel issues", Sherwin-Williams was not entitled to an award of attorneys' fees. Yet, they ignored Central States' persistent efforts to avoid the arbitrator's decision, and worse, they ignored the fact that the "novel issues" were completely without merit.

This Court should take the opportunity presented by this case to vindicate the rights of Sherwin-Williams and

all other similar prevailing ERISA parties and rectify the inconsistencies which currently exist in the federal common law standards of awarding attorneys' fees under MPPAA. More to the point, this Court should grant the writ because the decision of the court below was wrong.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with All Other Circuits That Have Decided the Same Issue

In the context of a MPPAA lawsuit, Congress vested the courts with the authority to "award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorneys' fees, to the prevailing party." 29 U.S.C. §1451(e). Without guidance from Congress or the Pension Benefit Guaranty Corp., district courts and circuit courts have articulated differing standards to guide them when they exercise their fees-and-costs-awarding discretion. The Seventh Circuit applied a unique standard and erroneously determined that Sherwin-Williams was not entitled to attorneys' fees because Central States' meritless position was "substantially justified." Under a five-factor test applied in a majority of the circuits which have addressed this issue, however, Sherwin-Williams would be entitled to the attorneys' fees incurred in this action.

First announced in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978), the five factors are:

(1) The degree of the offending parties' culpability or bad faith;

(2) The degree or ability of the offending parties to personally satisfy an award of attorney's fees;

(3) Whether or not an award of attorney's fees against the offending parties would deter other persons acting under similar circumstances;

(4) The amount of benefit conferred on members of the pension plan as a whole; and

(5) The relative merits of the parties' position.

Id. at 465. Although *Eaves* involved an award of attorneys' fees pursuant to 29 U.S.C. §1132(g), its test has been used by three of the five circuits that have decided the appropriate standard to follow in determining whether to award attorneys' fees under 29 U.S.C. §1451(e).[1] *See, e.g., Anita Founds. v. ILGWU Nat'l Retirement Fund*, 902 F.2d 185, 187-89 (2d Cir. 1990); *Central States, Southeast & Southwest Areas Pension Fund v. 888 Corp.*, 813 F.2d 760 (6th Cir. 1987); *Cuyamaca Meats, Inc. v. San Diego & Imperial Counties Butchers' & Food Employers' Pension*

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[1]The five factor test also has been applied by eight of the nine circuits which have decided whether to award attorneys' fees to prevailing defendants pursuant to §1132(g). See, e.g., *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257-59 (1st Cir. 1981); *Monkelis v. Mobay Chem.*, 827 F.2d 935 (3d Cir. 1987); *Hogan v. Kraft Foods, Inc.*, 969 F.2d 142, 146 n. 17 (5th Cir. 1992); *Firestone Tire and Rubber Co. v. Neusser*, 810 F.2d 550, 556-58 (6th Cir. 1987); *Hoover v. Armco, Inc.*, 915 F.2d 355, 357-58 (8th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991); *Credit Managers Ass'n v. Kennesaw Life & Accident Ins. Co.*, 25 F.3d 743, 748-50 (9th Cir. 1994); *Gordon v. United States Steel Corp.*, 724 F.2d 106, 108-09 (10th Cir. 1983); *Evans v. Bexley*, 750 F.2d 1498, 1500 (11th Cir. 1985).

Trust Fund, 827 F.2d 491 (9th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Although the Seventh Circuit equates the standards of §1132(g) with §1451(e), *Rootberg v. Central States Southeast & Southwest Areas Pension Fund*, 856 F.2d 796 (7th Cir. 1988), the Seventh Circuit's "substantially justified" standard clearly differs from the *Eaves* five factor test. The court below held that "the loser must pay if its position lacked a substantial basis." *Central States, Southeast & Southwest Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1346 (7th Cir. 1995). In *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 830 (7th Cir. 1984), the Seventh Circuit explained that a substantially justified position is "more than merely not frivolous, but less than meritorious." In other words, it "must have a solid though not necessarily correct basis in fact and law. . . ." *McDonald v. Schweiker*, 726 F.2d 311, 316 (7th Cir. 1983).

The substantially-justified standard conflicts with the five-factor analysis applied in other circuits. While the *Bittner* court opined that the two standards were consistent, subsequent decisions concerning the five factor test have acknowledged the conflict.[2] In *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251 (1st Cir. 1986), the First Circuit discussed the applicability of both *Eaves* and *Bittner*. The court held:

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[2]*See* David E. Gordon and Robert N. Eccless, *ERISA Attorney's Fees: an Unpredictable Situation*, 6 No. 10 Inside Litig. 17, October 1992.

> We decline to follow the Seventh Circuit approach and agree with the District Court below that the five factor standard is the appropriate test for awarding fees pursuant to ERISA, 29 U.S.C. §1132(g)(1) with respect to both prevailing plaintiffs and prevailing defendants.

Id. at 258. In the following year, the Seventh Circuit responded to *Gray*.

> Our analysis was rejected by the First Circuit in *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251, 257-60 (1st Cir. 1986), which decided to adhere to the conventional five-factor test, even though that test is oriented toward the case where a prevailing plaintiff rather than a prevailing defendant is asking for fees. *See also Firestone Tire & Rubber Co. v. Neusser*, 810 F.2d 550, 557-58 (6th Cir. 1987). Speaking with great respect, we find nothing in the First Circuit's opinion that persuades us to withdraw from *Bittner*, and we shall therefore adhere to it. We are not as enamored of multi-factored balancing tests as some of our colleagues in other circuits.

Van Boxel v. Journal Co. Employees Pension Trust, 836 F.2d 1048, 1054 (7th Cir. 1987) (citation omitted).

Exacerbating the confusion which exists among the circuits, the Third Circuit offers yet another standard pursuant to which attorneys' fees are awarded to prevailing MPPAA employers. In *Dorn's Transportation, Inc. v. Teamsters Pension Trust Fund*, 799 F.2d 45 (3d Cir. 1986), the court adopted a test established for prevailing

defendants in civil rights actions. The court held "that a prevailing employer is to be awarded attorney's fees under MPPAA only if the underlying claim against it was frivolous, unreasonable or without foundation." *Id.* at 46. Further, the court expressly rejected application of the five-factor test. *Id.* at 50 n. 7. To complete the disagreement among the circuits, the Seventh Circuit expressly rejected the Third Circuit's standard. *Rootberg*, 856 F.2d at 798.

All but three of the circuit courts have articulated a standard for exercising the discretion to award attorneys' fees either to prevailing defendants under §1132(g) or prevailing employers under §1451(e). Their positions are clear, and they conflict. Even among courts that agree upon using the five-factor test, "[t]he need for further evolution of the law of fee shifting under ERISA has been implicitly recognized . . . ." *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1304 (6th Cir. 1991) *citing Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980); *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir. 1980). This case presents an opportunity to define the federal common law with which the circuits have struggled to resolve their conflict. This Court should grant the writ.

II. The Need for A Uniform Standard Is Important

The standard to be applied in awarding attorney's fees for prevailing employers under MPPAA is critical 1) to a uniform application of the MPPAA provisions of ERISA, 2) as a control on the power given to a multiemployer plan under MPPAA, and 3) to ensure that the purposes for requiring a MPPAA arbitration are satisifed. Apart from the disagreement among the circuits on this issue,

the withdrawal liability scheme and the procedural mechanisms involved in it are matters of economic life and death to many employers. *See Shelter Framing Corp. v. Pension Benefit Guaranty Corp.*, 705 F.2d 1502, 1513 (9th Cir. 1983), *rev'd on other grounds, sub nom., Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984); *see also Peick v. Pension Benefit Guaranty Corp.*, 539 F. Supp. 1025, 1052 (N.D. Ill. 1982) ("withdrawal liability can be harsh and onerous . . . ."), *aff'd*, 724 F.2d 1247 (7th Cir. 1983), *cert. denied*, 467 U.S. 1259 (1984). Any uncertainty in the process tends to deter employers from entering multiemployer plans, an outcome directly contrary to the intention of Congress in enacting MPPAA. *See* 29 U.S.C. §1001a(c)(2).

Uniformity is among the most fundamental goals of ERISA. It reduces the burden of multiemployer pension plan operations, and ultimately inures to the benefit of the millions of plan participants. This Court has recognized that fact in the context of addressing the issue of ERISA's preemption of state law:

> A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Pre-emption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations.

Fort Halifax Packing Co. v. Coyne, 482 U.S 1, 11 (1987).

The *Fort Halifax* reasoning also applies to the issue of awarding attorneys' fees to prevailing MPPAA employers. Although the issue of attorneys' fees under MPPAA does not rise to the same level as the issue of ERISA preemption, nevertheless, the employer's task of forecasting labor expenses and liabilities becomes increasingly difficult when vagaries of multiple standards regarding the award of attorneys' fees are added to the mix. As a result, management comes to the bargaining table with trepidation concerning the issue of pension contributions and its ability to challenge a meritless assessment in a cost efficient manner.

In addition, an inconsistent application of the standards for awarding attorney fees to a prevailing employer also results in an inconsistent approach to the application of MPPAA by funds. In other words, an inconsistent standard allows a fund in one jurisdiction to press an aggressive and illogical interpretation of MPPAA without concern for the litigation expense incurred by the employer in responding, while a fund in another jurisdiction would be much more hesitant to press an unsupportable position beyond the arbitration.

The MPPAA strikes a strong bias in favor of pension funds seeking withdrawal liability from employers. It offers only two potential benefits to employers that are assessed. First, through the mandate of arbitration, MPPAA provides employers and funds alike with a time and cost efficient means of resolving their disputes. Second, through the authorization of awarding attorneys' fees, MPPAA attempts to provide employers with some assurance that funds will not abuse the benefits granted

them under MPPAA by rejecting arbitration awards and unduly pressing litigation.

Unable to predict with any certainty when these protections will be available, employers will assume the worst and reserve for litigation the resources that otherwise might be offered at the bargaining table for the benefit of employees.

Regardless of which attorneys'-fees-awarding standard is correct, the conflict does nothing to facilitate the free flow of interstate commerce or increase participation in multiemployer plans. Yet, these are express purposes for the enactment of the MPPAA. 29 U.S.C. §1001a(c)(1) and (2). A determination on this issue will eliminate substantial uncertainty and should result in a significant conservation of resources by parties in the courts below thereby fostering the goals of Congress.

The conflict among the circuits that exists on this issue should be resolved. It is a question of wide and general concern. Recent government published figures indicate that there are nearly 10 million participants in multiemployer pension plans and more than 3,000 plans. Pension and Welfare Office of Research and Economic Analysis, U.S. Dep't of Labor, Abstract of 1992 Form 5500 No. 5, *Private Pension Plan Bulletin* (Winter 1996). Remedial provisions of ERISA and MPPAA were enacted to ensure vindication of the rights of the participants and contributors to the funds. Certainly, ERISA did not contemplate that employers, participants and fiduciaries in one circuit would have rights different from those in another. Specifically, 29 U.S.C. §1401(b)(2) provides that following issuance of the arbitrator's award, any party may

bring an action in an appropriate United States district court in accordance with 29 U.S.C. §1451(d) to enforce, vacate, or modify the arbitrator's award. 29 U.S.C. §1451(d) provides that such action may be brought in the district where the plan is administered or where a defendant resides or does business. Thus, where either the plan or the employer loses at the arbitration level, it can select that forum otherwise permitted which uses the more restrictive attorneys'-fees-and-costs-awarding standard and thereby reduce its exposure for pressing a questionable position. Alternatively, a prevailing party will be inclined to seek enforcement in that forum which adheres to the more liberal attorneys'-fees-and-costs-awarding standard. The path to forum shopping for attorneys' fees can only be barred by this Court's resolving the conflict among the circuits.

III. The Decision Below Was Wrong

The five-factor test should apply in every circuit, including the Seventh Circuit. If the Seventh Circuit had applied the five-factor test relied upon by the majority of other circuits, a contrary result would have obtained.[3] Nevertheless, even if the Seventh Circuit's "substantially

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[3]Sherwin-Williams never attempted to persuade the Seventh Circuit to adopt the five-factor *Eaves* test. As discussed *supra*, the Seventh Circuit had recently refused to change its position. Without any intervening developments in the law, Sherwin-Williams had no basis upon which to demand that the Seventh Circuit correct its erroneous precedent. Because the precedent was both recent and well-established in the Seventh Circuit, however, it would be "unreasonable" to bar Sherwin-Williams from raising the argument for the first time before this Court. *See United States v. Williams*, 504 U.S. 36, __, 118 L. Ed. 2d 352, 363 (1992).

justified" test is appropriate, Sherwin-Williams is entitled to an award of attorneys' fees under that standard.

A. The Five Factor Test is a Better Standard

The Seventh Circuit derived its novel standard from that used under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. §2412(d)(1)(A) (repealed October 1, 1984). Significantly, under the EAJA, a prevailing party would only collect attorneys' fees from the United States Government. As the First Circuit recognized, however, "[a] multi-faceted approach is more desirable when fees are to be assessed against parties other than the United States." *Gray*, 792 F.2d at 259.

Awarding attorneys' fees against a private party involves considerations not relevant to the same issue involving the government. For example, perhaps the most important reason to award Sherwin-Williams attorneys' fees is to deter similar conduct by other pension funds. The MPPAA provides plan sponsors with extraordinary power to assess and collect monies for withdrawal liability. Unless an employer, such as Sherwin-Williams, is able to recover the attorneys' fees incurred by being forced to both respond to inappropriate withdrawal liability assessments and to pay monies pending the resolution of the assessment, a plan sponsor, such as Central States, can misuse its MPPAA powers to harass and abuse employers. *See Anita Founds. v. ILGWU Nat'l Retirement Fund*, 902 F.2d at 191. The same consideration of deterrence did not apply to cases involving the United States.

Because awarding attorneys' fees under MPPAA involves additional considerations not present under the

EAJA, the five-factor test is superior to the EAJA and the Seventh Circuit's "substantially justified" standard. The *Bittner* court praised its newly adopted standard, referring to it as "simpler and more definite" than the five-factor test. 728 F.2d at 830. But that is precisely its flaw. It fails to accommodate all the significant factors which must be considered in MPPAA withdrawal liability cases.

In sharp contrast, the five factor test offers the flexibility and clarity necessary to provide "guidance to the district courts in evaluating fee requests . . . and enable meaningful appellate review." *Eddy v. Colonial Life Ins. Co. of Am.*, 59 F.3d 201, 206 (D.C. Cir. 1995). The circuits applying this standard uniformly agree that the five "factors are neither exclusive nor quantitative. . . ." *Id.* (citing *Freeman v. Continental Ins. Co.*, 966 F.2d 1116, 1119 (11th Cir. 1993); *Quesinberry v. Life Ins. Co.*, 987 F.2d 1017, 1029 (4th Cir. 1993) (*en banc*); *Iron Workers Local # 272 v. Bowen*, 624 F.2d 1255, 1265 (5th Cir. 1980)).[4] Thus, the courts have applied the five factor test with equal consistency in cases involving prevailing plaintiffs and defendants. Given the wide and proper acceptance of the five factor test, this malleable standard should similarly apply to a prevailing employer seeking attorneys' fees under 29 U.S.C. §1451(e).

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[4]*See also* Alan P. Woodruff, *Attorneys' Fees Under ERISA*, 67 Fla. B.J. 24, 26 (August 1993).

B. Sherwin-Williams is Entitled to Attorneys' Fees Based on an Application of the Five Factor Test

If applied in this case, the five factor test leads only to the conclusion that Sherwin-Williams should be awarded attorneys' fees. The first factor in the test -- bad faith or culpability -- need not be satisfied to properly award attorneys' fees. *See, e.g., Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. 1538, 1560 (C.D. Cal. 1988) (citing *Carpenters S. Cal. Admin. Corp. v. Russell*, 726 F.2d 1410, 1416 (9th Cir. 1984). Nevertheless, the conduct of Central States does evince bad faith or culpability.

Central States acted in bad faith. Pursuant to 29 U.S.C. §1383(a), a complete withdrawal from a multiemployer plan occurs when an employer:

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

Central States assessed Sherwin-Williams for a complete withdrawal without any evidence to satisfy the plain language of either condition. Indeed, to the contrary, Central States has consistently recognized that after the sale of Lyons by Sherwin-Williams, "Dupli-Color . . . is still owned by Sherwin-Williams and still contributes to Central States." Central States' Petition for Writ of Certiorari, p. 3.

Without any evidence in support of its assessment, Central States "could not have had a good faith reasonable belief that it could prove its ERISA claim" against Sherwin-Williams. *Credit Managers Ass'n v. Kennesaw Life and Accident Ins. Co.*, 25 F.3d 743, 749 (9th Cir. 1994).

Indeed, at the same time that Central States was arguing that 29 U.S.C. §1398 required that the Sherwin-Williams controlled group should be ignored for purposes of determining whether the withdrawal was complete or partial, Central States was taking a contrary position in another litigation, arguing that a sale which it alleged did not satisfy the requirement of 29 U.S.C. §1398, constituted a partial withdrawal with respect to the selling controlled group. *See Santa Fe Pacific Corporation v. Central States, Southeast & Southwest Areas Pension Fund*, No. 92 C 0677, 1992 U.S. Dist. Lexis 15159 (N.D. Ill. October 6, 1992), *rev'd*, 22 F.3d 725 (7th Cir.), *and cert. denied*, 130 L. Ed. 2d 396 (1994).[5] The need for a fund to protect its members by pursuing withdrawal liability does not excuse the fact that Central States caused Sherwin-Williams "to expend unnecessary effort and resources in defending the instant lawsuit." *Farris v. Century Planners, Ltd.*, 858 F. Supp. 150, 154 (D. Kan. 1994).

Central States has now issued *three* withdrawal assessments against Sherwin-Williams, all related to Lyons. Sherwin-Williams has been forced to prepare three separate, voluminous and costly Requests for Review in

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[5]For the convenience of the Court, a copy of the unreported opinion is attached hereto at Appendix A11.

order to adequately preserve its rights. Further, Central States' vexatious assessments forced Sherwin-Williams to seek two separate arbitrations, with the pending possibility of a third, all related to Lyons. If Central States had properly investigated the status of Sherwin-Williams and its controlled group prior to issuing its complete withdrawal assessment, Sherwin-Williams certainly would not have been required to incur the significant expenses incurred in preparing the Request for Review and in seeking arbitration pertaining to the instant case, not to mention its expenses with respect to Central States' subsequent assessments which are still pending[6].

The second factor in the analysis -- ability to pay attorneys' fees -- clearly weighs in favor of awarding the fees. Central States has paid much larger amounts of attorneys' fees than are at issue before this Court. In *Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. 1538 (C.D. Cal. 1988), the district court awarded $1.9 million in attorneys' fees and costs against Central States, which had $8 billion in assets at the time. *Id.* at 1561. Furthermore, just a quick glance at the table of authorities, *supra*, will make clear that the hyper-litigious Central States obviously has substantial resources available for litigation.

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[6]Ultimately, Central States, by its third assessment, has taken that position which Sherwin-Williams had articulated to Central States in the initial Request for Review -- namely, that, at best, the only withdrawal liability that could possibly be assessed against Sherwin-Williams with respect to Lyons was a 70% decline partial withdrawal that could not be determined until after December 31, 1993.

The third factor -- deterrence -- also favors an award of fees. The reasoning of *Vintilla v. United States Steel Corp. Plan for Employee Pension Benefits*, 642 F. Supp. 295 (W.D. Pa. 1986), *aff'd, sub nom., Appeal of Ayo*, 815 F.2d 693 (3d Cir.), *and aff'd, sub nom., Appeal of Campbell*, 815 F.2d 693 (3d Cir.), *and aff'd*, 815 F.2d 697 (3d Cir.), *cert. denied, sub nom., Belak v. United States Steel Corp. Plan for Employee Pension Benefits*, 484 U.S. 847 (1987), fits squarely with the instant facts: The "deterrent effect will be beneficial upon those who contemplate speculative litigation on thinly based grounds, particularly those whose expectations amount to a double recovery." *Id.* at 297. An award of attorneys' fees in this case would discourage other funds "from asserting, and possibly fabricating, claims with no basis in law or fact." *Paddack v. Morris*, 783 F.2d 844, 847 (9th Cir. 1986).

The fourth factor concerns whether a benefit is conferred on members of the pension plan as a whole. This factor, too, suggests that an award of attorneys' fees should be made. The courts have consistently held that a benefit is conferred upon all plan members when an important legal issue is resolved. *See, e.g., Hummel v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980) (incorporating resolution of important legal issues into the fourth factor); *see also Grand Union Co. v. Food Employers Labor Relations Ass'n*, 808 F.2d 66, 71 (D.C. Cir. 1987) (applying *Hummel*, in *dicta*, to a MPPAA case). The entitlement to attorneys' fees, in this case, raises an important legal issue which merits an award of fees and costs. *See Cowden v. Montgomery County Soc'y for Cancer Control*, 653 F. Supp. 1072, 1078 (S.D. Ohio 1986). Alternatively, this factor weighs in favor of awarding fees to a defendant where the plaintiff fails to resolve

significant legal issues. *See Credit Managers Ass'n*, 25 F.3d at 748. As explained in Sherwin-Williams' Respondent's Brief in Opposition to the Petition for Certiorari, the position asserted by Central States was contrary to the clear language of MPPAA and in conflict with Congressional intent.[7] Finally, the deterrent effect of awarding attorneys' fees to a defendant that was subjected to such a meritless and speculative claim by Central States, benefits plan members by reducing the future litigation costs of the fund. *See Anita Foundations*, 902 F.2d at 191.

Fifth, the courts below should have awarded attorneys' fees to Sherwin-Williams because it successfully defended a claim that was without merit. The courts below denied Sherwin-Williams' request because they found Central States' position "substantially justified." While that conclusion, if true, might suggest the absence of bad faith on the part of Central States, it does not bar the possibility of culpable conduct nor change the fact that the position was without merit.

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[7]If this Court should disagree and find that the issue raised by Central States was worthy of consideration, the finding would provide even greater support for an award of attorneys' fees to Sherwin-Williams. By prevailing in defense of Central States' allegations, Sherwin-Williams will have obtained a resolution of, what this Court deems, an important legal issue. Prevailing on such a defense favors an award of attorneys' fees. *See Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. at 1561; *Schetter v. Prudential-Bache Sec., Inc.*, 695 F. Supp. 1077, 1083 (E.D. Cal. 1988).

The fifth factor favors an award of attorneys' fees to Sherwin-Williams because Sherwin-Williams' "position on the merits [is] significantly stronger than" Central States'. *Fabian Fin. Servs. v. Kurt H. Volk, Inc. Profit Sharing Plan*, 768 F. Supp. 728, 734 (C.D. Cal. 1991). Even in cases where a plaintiff's claim is "not entirely unmeritorious, though ultimately unavailing[, t]his fifth *Hummel* factor also weighs in favor of [the defendant], however slightly." *Trustees of Central States, Southeast & Southwest Areas Pension Fund v. Golden Nugget, Inc.*, 697 F. Supp. at 1561. But in this case, Central States failed to prevail on a single claim against Sherwin-Williams. "Therefore, the relative merits of the parties weighs heavily in favor of an award of attorneys' fees in favor of" Sherwin-Williams. *Schetter*, 695 F. Supp. at 1083.

In *Vintilla*, 642 F. Supp. 295, the court awarded attorneys' fees to the prevailing employer because "the continued litigation was highly speculative and . . . represented an attempt to receive the same benefits twice. . . ." *Id.* at 297. Similar facts are before this Court. Like the "double dipping" in *Vintilla*, Central States imposed a second partial withdrawal assessment against Sherwin-Williams at the same time Central States was pursuing the assessment for complete withdrawal. It was only after Sherwin-Williams initiated an action to enjoin Central States from its attempt to double dip, that Central States postponed the attempt to collect twice.

Because Sherwin-Williams should be awarded attorneys' fees under the five factor standard, this Court should grant the writ and correct the error of the court below.

C. The Courts Below Erred in Finding That Central States' Position was Substantially Justified

The foregoing discussion of how Sherwin-Williams' claim for attorneys' fees satisfies the five factor test also casts into stark relief the errors made by the courts below in applying the "substantially justified" standard. An analysis of the five factors yields a conclusion in favor of Sherwin-Williams. In contrast, the "substantially justified" standard "creates a modest presumption . . . in favor of awarding reasonable attorney's fees to the winning party, plaintiff or defendant. . . ." *Bittner*, 728 F.2d at 830. Yet, the courts below still denied an award to Sherwin-Williams.

At its heart, the reasoning of the courts below is that Central States raised complex novel issues. The courts' reasoning is flawed. According to the district court the issue was "not just the cessation of contributions by a subsidiary, but [whether] such a cessation [was] *caused* directly by its parent's action in selling the subsidiary's stock so as to disable the subsidiary financially." (Central States' Petition for Writ of Certiorari, Appendix, p. 32a) (hereinafter "App., p.__")(emphasis added). The circuit court below, however, correctly noted that "the arbitrator ruled against [Central States] without addressing the causation question. . . ." (App., p. 6a). Thus, neither court below had reason to address the allegedly complex novel issue. Instead, this case has been decided on the more straightforward issue of whether a complete withdrawal could occur when other members of the control group continue making contributions. Thus, it is precisely because Central States attempted to thwart Sherwin-Williams' resistance with the use of irrelevant legal

obfuscation that the position of Central States is not substantially justified and warrants an award of attorneys' fees to Sherwin-Williams.

CONCLUSION

For the foregoing reasons, Respondent and Cross-Petitioner Sherwin-Williams urges this Court to grant the Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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A2

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 81--SUPREME COURT

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE A--GENERAL PROVISIONS

§ 1001a. Additional Congressional findings and declaration of policy

(a) Effects of multiemployer pension plans

The Congress finds that--

(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest;

(2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades;

(3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and

(4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and

(B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) Modification of multiemployer plan termination

insurance provisions and replacement of program

The Congress further finds that--

(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and

(2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) Policy

It is hereby declared to be the policy of this Act--

(1) to foster and facilitate interstate commerce,

(2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans,

(3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and

(4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I--PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B--REGULATORY PROVISIONS
PART 5--ADMINISTRATION AND ENFORCEMENT

§ 1132. Civil enforcement

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan--

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of--

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action,

to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN TERMINATION INSURANCE
SUBTITLE E--SPECIAL PROVISIONS FOR MULTIEMPLOYER PLANS
PART 1--EMPLOYER WITHDRAWALS

§ 1383. Complete withdrawal

(a) Determinative factors

For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer--

(1) permanently ceases to have an obligation to contribute under the plan, or

(2) permanently ceases all covered operations under the plan.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN TERMINATION INSURANCE
SUBTITLE E--SPECIAL PROVISIONS FOR MULTIEMPLOYER PLANS
PART 1--EMPLOYER WITHDRAWALS

§ 1401. Resolution of disputes

(b) Alternative collection proceedings; civil action subsequent to arbitration award; conduct of arbitration proceedings

(1) If no arbitration proceeding has been initiated pursuant to subsection (a) of this section, the amounts demanded by the plan sponsor under section 1399(b)(1) of this title shall be due and owing on the schedule set forth by the plan sponsor. The plan sponsor may bring an action in a State or Federal court of competent jurisdiction for collection.

(2) Upon completion of the arbitration proceedings in favor of one of the parties, any party thereto may bring an action, no later than 30 days after the issuance of an arbitrator's award, in an appropriate United States district court in accordance with section 1451 of this title to enforce, vacate, or modify the arbitrator's award.

(3) Any arbitration proceedings under this section shall, to the extent consistent with this subchapter, be conducted in the same manner, subject to the same limitations, carried out with the same powers (including subpena power), and enforced in United States courts as an arbitration proceeding carried out under Title 9.

UNITED STATES CODE ANNOTATED
TITLE 29. LABOR
CHAPTER 18--EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER III--PLAN TERMINATION INSURANCE
SUBTITLE E--SPECIAL PROVISIONS FOR MULTIEMPLOYER PLANS
PART 6--ENFORCEMENT

§ 1451. Civil actions

(d) Venue and service of process

An action under this section may be brought in the district where the plan is administered or where a defendant resides or does business, and process may be served in any district where a defendant resides, does business, or may be found.

(e) Costs and expenses

In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

No. 92 C 0677

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

SANTA FE PACIFIC CORPORATION, Plaintiff,
v.
CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND, Defendant.

October 6, 1992, Decided
October 7, 1992, Docketed

OPINION: Hon. Paul E. Plunkett

MEMORANDUM OPINION AND ORDER

Defendant Central States, Southeast and Southwest Areas Pension Fund ("Central States") has moved under Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend our Memorandum Opinion and Order of August 20, 1992 (the "Opinion"). In that Opinion, we granted Central States' motion to vacate the arbitrator's award, and we remanded this case to the arbitrator for clarification of the standard he applied under *29 U.S.C. § 1392(c)*. We also denied Plaintiff Santa Fe Pacific Corporation's ("Santa Fe") motion to confirm the arbitrator's award.

Central States raises three issues in its current motion. First, it asserts that we misunderstood its argument that Santa Fe is liable for a partial withdrawal because of a seventy percent decline in contribution levels, and it asks us to remand this issue to the arbitrator.[1] Second, it requests clarification regarding our suggestion in the Opinion that the two-pronged "objective/subjective" test formulated by Judge Moran in *In re Int'l Harvester's Disp. of Wisconsin Steel Litig., 681 F. Supp. 512 (N.D. Ill. 1988)*, is an appropriate guideline for determining a violation of *29 U.S.C. § 1392(c)*. Third, it requests that we remand this case to a new arbitrator. We have already rejected the last request,[2] so we address only the first two issues in this Opinion. For the reasons set forth below, we grant Central States' motion in part and deny it in part.

Discussion

We note as a preliminary matter that Rule 59(e) is not available to Central States given the posture of this case. Rule 59(e) applies only to "final" judgments. *National R.R. Passenger Corp. v. New Castle County, 636 F. Supp. 1482, 1486 (D. Del. 1986)*. "'Judgment' as used in [the Federal Rules of Civil Procedure] includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a). Our decision, set forth in the Opinion, is not an appealable order, for the parties must move again in this

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[1]Central States asked alternatively that we certify the seventy percent decline issue to the Court of Appeals. We denied this request in our Order of September 11, 1992.

[2]See Order of September 11, 1992.

Court to confirm or to vacate the arbitrator's award after the arbitrator issues his new Report.

As a result, if we are to consider the motion at all, we must treat it as a common law motion for reconsideration. Rodgers v. Sullivan, 1991 WL 274446, n.1 (N.D. Ill. Dec. 13, 1991); *Above the Belt v. Mel Bohannan Roofing, 99 F.R.D. 99, 101 (E.D. Va. 1983)*. Because we believe that consideration of the issues presented in the motion will clarify our views for the benefit of the arbitrator, we will consider them.

I. Partial Withdrawal Liability

Central States had argued in its motion to vacate the arbitrator's award that the arbitrator had failed to rule on the threshold question of whether Santa Fe had experienced a seventy percent decline in contribution levels from 1983 through 1985 so as to constitute a partial withdrawal under *29 U.S.C. § 1385* (1985). We rejected this argument at that time because we found that Central States was attempting to hold Santa Fe responsible for the withdrawal liability of SFTT alone, but that at the time of Santa Fe's sale of SFTT, which occurred midway through the three-year test period required by § 1385, SFTT may have ceased to be a member of the Santa Fe control group and may have become a member of the Rail Services, Inc., control group. We held:

Central States cannot attribute SFTT's contribution levels in the latter half of 1984 and in 1985 to Santa Fe at all unless Central States can avail itself of § 1392(c), so that the sale can be disregarded, or unless Central States can show the sale of SFTT's stock was not a change in

corporate structure within the meaning of § 1398.

Opinion at 7-8.

We noted in the Opinion that Central States had failed to provide us with a single citation to the arbitration record to demonstrate that the contribution levels of any entity purportedly in the Santa Fe control group, other than SFTT, were submitted in evidence to the arbitrator. Now Central States provides to us for the first time information apparently compiled from Central States Exhibit 177, one of well over one hundred exhibits (as best we recall) that were used during the arbitration. On the basis of the information taken from this exhibit, Central States now attempts to give us facts to demonstrate the existence of the seventy percent decline in the Santa Fe control group's contribution levels.

Central States may not remedy on a motion for reconsideration omissions it made earlier in these proceedings. See *United States ex rel. Lynch v. Sandahl, 793 F. Supp. 787, 795-96 (N.D. Ill. 1992)* ("[A] motion for reconsideration may not be employed as a vehicle to introduce new evidence that could have been produced prior to the entry of judgment.") Central States has had repeated opportunities to present this argument but has consistently failed to do so in a coherent manner. Before the arbitrator, Central States relied on two theories: first, that Santa Fe's sale of SFTT violated § 1392(c) because Santa Fe sold SFTT with the intent to "evade or avoid" its liabilities under the MPPAA; and second, that the sale did not constitute a "change in corporate structure" within the meaning of *29 U.S.C. § 1398*. But it did not tell the arbitrator (in any meaningful manner that we could

discern from the arbitration record) that it was relying on the seventy percent decline issue. Having failed to present the issue to the arbitrator for decision, Central States then addressed it squarely for the first time in its motion to vacate. Still, it failed to support its argument with any evidence which demonstrated that it had calculated the seventy percent decline based on the contribution levels of any entity other than SFTT.[3] Finally, in this motion, Central States has gotten around to identifying the specific evidence which it claims supports its position.

This is a problem, however, for Central States obviously knew about Exhibit 177, and the information it contained relating to the seventy percent decline, at the time of the arbitration hearing. It also knew about Exhibit 177 when it asked this Court to vacate the arbitrator's award. We believe that its failure to identify the evidence supporting its argument about a seventy percent decline before now is inexcusable. This piecemeal presentation of the issue has forced the parties and this Court to consider the issue twice, and, if we remand this issue as Central States requests, it would force the arbitrator to re-open the hearing as well. We are extremely dismayed by the cavalier manner in which Central States has repeatedly wasted the time and energy of everyone involved in this case.

And, to make matters worse, we think Central States'

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[3]As we noted in the Opinion, Central States' argument on this issue in its brief in support of its motion to vacate contained no record citations at all. Opinion at 7.

argument is wrong. As we said when we first rejected this argument, when SFTT left the Santa Fe control group in 1984, it took its contribution history with it. See § 1398. Unless Central States can establish that SFTT remained in the Santa Fe control group following the sale, a fact that cannot be assumed, Santa Fe had no responsibility for SFTT's contribution levels or withdrawal liability after 1984.

Opinion at 8. Thus, even with the information Central States now offers from Exhibit 177, Central States cannot succeed, for we believe that SFTT's contribution history followed it at the time of the sale. As a result, if Central States wanted to impose withdrawal liability on the Santa Fe control group, which after 1984 was composed solely of Santa Fe Terminal, such liability would have to be calculated on Santa Fe Terminal's contribution history alone.[4] As Central States' chart in its brief shows, this is not the calculation Central States made. (Def.'s Br. at 3.)

Central States argues that the PBGC has expressed the opinion that where a change in corporate structure within the meaning of § 1398 occurs, an "equitable allocation" of the resulting withdrawal liability must be made. Def.'s Br. at 7; see PBGC Op. Letter 92-1, *1992 PBGC-LEXIS 1* (March 30, 1992). Central States misstates the PBGC's position, which is that typically an allocation of the contribution history of the sold entity would be made between all entities which are "successors" within the meaning of § 1398. PBGC Op. Letter 92-1, 1992

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[4]Santa Fe Terminal is merely another subsidiary of Santa Fe Pacific Corporation. See Def.'s Br. at 3.

PBGC-LEXIS at *6. Equitable allocation of contribution history is quite different than equitable allocation of withdrawal liability, for once the contribution history is allocated, there may be no withdrawal liability at all. We note also that the factual scenario which forms the basis of the PBGC's opinion is distinguishable from the factual scenario here, for the Santa Fe control group at issue here includes only SFTT and Santa Fe Terminal. Here, there is no "parent" corporation, as there is in the PBGC's hypothetical (see 1992 PBGC-LEXIS at *2), to which some portion of SFTT's contribution history should be allocated due to a history of "large transfers of covered operations or covered employees between members of the controlled group, or other unusual factors" (1992 PBGC-LEXIS at *6). There is only Santa Fe Terminal.[5] We can see no reason why Santa Fe Terminal, which has its own contribution history, should be allocated any portion of SFTT's contribution history.

Central States urges us to apply the PBGC's analysis regarding partial withdrawal liability as well. The PBGC suggests that where a seventy percent decline did not occur "solely because" of a change in corporate structure under § 1398, the sold subsidiary's contribution history must be included in determining the high base year of the parent's control group. 1992 PBGC-LEXIS at *10. This assumes that the sold subsidiary's contribution history stays with the parent for purposes of calculating a seventy percent decline under § 1385. However, the PBGC's

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[5]Central States, in its briefing earlier and on this motion, is basing its argument on a control group composed of only SFTT and Santa Fe Terminal. See Def.'s Br. at 3.

analysis disregards completely the future operations of the sold subsidiary. As Santa Fe points out, this analysis would result in the imposition of partial withdrawal liability on a seller corporation even if the sold subsidiary had prospered (and all contributions had been paid by the purchaser) after the sale. This results in a windfall to the pension plan, which is paid twice for the unfunded vested pension benefit liability of the sold subsidiary: once by the seller, who pays the partial withdrawal liability, and a second time by the purchaser, who continues all contributions. Since this double payment would not occur if the subsidiary were never sold, we see little reason why it should occur merely because of the sale, where the sale does not result in any interruption of contributions by the sold entity. We do not read § 1385 to require this result.[6] We believe the better interpretation is the one we discussed above: the contribution history of the sold entity goes with it after the sale.[7] This analysis should apply regardless of whether the sold subsidiary flourishes or fails, since § 1385 does not require that the result depend

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[6]The MPPAA generally, and § 1385 specifically, are silent on the issue of how to treat the contribution history of an entity that is sold. We believe that our conclusion is consistent with the rationale of § 1398 that "a successor or parent corporation or other entity resulting from any such change [in corporate structure] shall be considered the original employer." *29 U.S.C. §1398.*

[7]We have little doubt that Central States served the notice of withdrawal liability on Santa Fe only because the Rail Services, Inc., control group (which SFTT joined after the sale) never paid SFTT's withdrawal liability, and that Central States would not have assessed partial withdrawal liability on Santa Fe if SFTT had not gone under. Under the analysis it proposes now, however, it was entitled to impose that liability on Santa Fe regardless of SFTT's fate.

on such circumstances.

For all of these reasons, we deny Central States' motion on the seventy percent decline issue.

II. The Wisconsin Steel Test

Central States also asks us to reconsider our suggestion that the two-pronged "objective/subjective" test formulated by Judge Moran in *In re Int'l Harvester's Disp. of Wisconsin Steel Litig., 681 F. Supp. 512 (N.D. Ill. 1988)*, is an appropriate guideline for determining a violation of *29 U.S.C. § 1392(c)*. See Opinion at 10. As Central States points out, Judge Moran in fact concluded that where the statutory provision contained language nearly identical to the language of § 1392(c), the objective prong of the test was inapplicable. See *Wisconsin Steel, 681 F. Supp. at 527.*

We agree with both Central States and Judge Moran, and we modify the Opinion regarding use of two-pronged Wisconsin Steel test. The language of § 1392(c), "a principal purpose . . . to evade or avoid liability," focuses on subjective intent alone. The inclusion of the objective prong of the test as a requirement of equal weight to the subjective prong would add to § 1392(c) an additional consideration that is not supported by the language of §1392(c) itself.

We believe, however, that in the vast majority of cases objective facts regarding the viability of the purchaser will carry substantial weight as evidence of the seller's subjective intent. Thus, the objective viability of the purchaser, while not a separate prong entitled to equal consideration, will generally be a major factor in

determining whether a seller had as "a principal purpose" the evasion or avoidance of liability. We believe this approach is consistent with the language of § 1392(c).

Our modification of the Opinion regarding the Wisconsin Steel test does not change the standard we articulated in the Opinion regarding § 1392(c). There we suggested the Wisconsin Steel test only in the context of Central States' argument that the arbitrator should have considered only Santa Fe's subjective intent, not the interest of the McKee-led employee group in purchasing SFTT. Opinion at 10. Thus, our conclusion regarding the proper standard to be applied under § 1392(c) remains the same. See Opinion at 3-5.

We add a caveat here as we did in the Opinion: we offer no opinion on whether the Wisconsin Steel test and the related analysis of subjective intent must be revisited on remand. See Opinion at 10. We have clarified our earlier discussion only to provide guidance; the arbitrator is free to determine if the issue is necessary to his clarification of the standard he applied under § 1392(c).

III. Santa Fe's Request for Reconsideration

Although Santa Fe failed to bring its own motion, it asks us to affirm the "sham" standard under § 1392(c) based on this Court's prior ruling in *Banner Indus. Inc. v. Central States Pension Fund, 657 F. Supp. 875 (N.D. Ill. 1987)* and the Seventh Circuit's recent decision in Central States v. Cullum Cos., Inc., No. 91-2844, slip op. (Sept. 1, 1992). We rejected this argument when Santa Fe proposed it in its motion to confirm the arbitrator's award.

Having rejected this argument once, we will not affirm the "sham" standard now. What Santa Fe has done is merely to reiterate the arguments it made in its motion to confirm the arbitrator's award, an inappropriate use of a motion for reconsideration.[8] *United States ex rel. Lynch v. Sandahl, 793 F. Supp. 787, 796 (N.D. Ill. 1992).*[9] What Santa Fe has not done is give us a good reason to change our mind.

Santa Fe has brought to our attention the Seventh Circuit's recent decision in Central States v. Cullum Cos., Inc., 1992 WL 209694 (Sept. 1, 1992). As we read that decision, it is neither inconsistent with the standard under § 1392(c) that we articulated in the Opinion nor in any way controlling in this case. Cullum did not address the

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[8]We disagree with Santa Fe that this Court's decision in *Banner Industries, Inc. v. Central States, 657 F. Supp. 875 (N.D. Ill. 1987)*, is inconsistent with our Opinion in this case. The issue before us in Banner Industries was not the appropriate standard under § 1392(c), but whether the determination that Banner's sale of its subsidiary's stock to an ESOP caused Banner to cease to be an "employer" under the MPPAA, and whether that question had to be decided by this Court or an arbitrator. *657 F. Supp. at 879-83.* Nothing in that decision constitutes a holding that the language of § 1392(c) requires a finding that a transaction must be a "sham" or "fraud" to violate that provision, which is the position Santa Fe wishes us to take now.

[9]As the Court said in Lynch, "'This Court's opinions are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure.'" *793 F.2d at 796 (quoting Quaker Alloy Casting Co. v. Gulfco Indus., Inc., 123 F.R.D. 282, 288 (N.D. Ill. 1988)).* The argument that we were wrong in rejecting the "sham" standard is more properly addressed to the Court of Appeals. See *Refrigeration Sales Co. v. Mitchell-Jackson, Inc., 605 F. Supp. 6, 7 (N.D. Ill. 1983), aff'd, 770 F.2d 98 (7th Cir. 1985).*

question of the standard under § 1392(c), for the case did not involve that provision, as the Seventh Circuit noted. 1992 WL 209694, at *6 ("The parties agree that neither [*29 U.S.C. § 1384(a)(1)* nor *29 U.S.C. § 1392(c)*] applies in this case.") The Court mentioned the words "sham transactions" only in considering the arbitrator's express concern that § 1384(a)(1)(A) did not adequately safeguard the pension plan's interests. *Id.*[10] Section 1384 explicitly exempts a "bona fide, arms-length sale of assets" from withdrawal liability. Id. We believe that the standard of "sham" or "fraud" is clearly appropriate under the "bona fide, arms-length" language of § 1384, for the focus there is an objective one. In contrast, § 1392(c) does not exempt a "bona fide, arms-length" transaction; rather, it prohibits any transaction which has as "a principal purpose" the evasion or avoidance of liability. By this language, it focuses on the subjective intent of the seller.

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[10]The Seventh Circuit's discussion of the "sham transaction" issue states, in its entirety: The third flaw in the arbitrator's analysis is his belief that taking section 1384(a)(1)(A) at face value would 'emasculate the intended purpose of preventing erosion of the plan's contribution base.' Section 1384 taken as a whole does not leave multiemployer pension plans or employees unprotected. The pension plans and employees are protected, but the safeguards appear in other subsections of section 1384 and the MPPAA. For example, the section 1384 exemption applies only to 'bona fide, arm's-length sale of assets to an unrelated party.' *29 U.S.C. § 1384(a)(1)*. Similarly, *29 U.S.C. § 1392(c)* provides that 'if a principal purpose of any transaction is to evade or avoid liability,' the withdrawal liability provisions of the MPPAA 'shall be applied (and liability shall be determined and collected) without regard to such transaction.' These two provisions ensure that businesses cannot avoid withdrawal liability through sham transactions. The parties agree that neither provision applies in this case. 1991 WL 209694, at *6.

We do not read the Seventh Circuit's limited discussion in Cullum as a determination that a transaction must constitute a "sham" or "fraud" to violate § 1392(c).

The standard we articulated in the Opinion, that evasion or avoidance of liability must be a significant or central factor behind a transaction, is less stringent than the "sham" or "fraud" standard which Santa Fe advocates. Obviously, under our standard any transaction which constituted a "sham" or "fraud" would violate § 1392(c); so would a transaction which was not a "sham" or "fraud" but had as "a principal purpose" the evasion or avoidance of liability. The example given by Judge Moran in Wisconsin Steel is illustrative: the sale of a business to a purchaser which is a Fortune 500 company would hardly constitute a "sham" or "fraud" under any common meaning of those terms, but where the seller had as a principal purpose the evasion or avoidance of its liability under the MPPAA, then the transaction would violate § 1392(c) and could be disregarded in determining withdrawal liability. See *Wisconsin Steel, 681 F. Supp. at 527.* We do not believe that this standard is inconsistent with the Seventh Circuit's comment in Cullum.[11]

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[11]Santa Fe bases its argument in part on our citation to the Sixth Circuit's decision in *Teamster's Pension Trust Fund v. Central Michigan Trucking, 857 F.2d 1107 (6th Cir. 1988).* We cited that case only in footnote 4 of the Opinion, in which we declined to adopt for § 1392(c) the meaning of "sham or fraud" used in the Tax Code, as Santa Fe urged us to do. In *Teamster's Pension Trust Fund v. Central Michigan Trucking, 857 F.2d 1107 (6th Cir. 1988),* the Sixth Circuit rejected a similar argument for analogizing to the Tax Code the language of a different section of the MPPAA. Footnote 4 of the Opinion is incorrect to the extent it states that the Sixth Circuit had considered §

Conclusion

We grant Central States' Motion to Alter or Amend Judgment with regard to the Wisconsin Steel test, and we clarify our position on that test in this Opinion. We deny the remainder of Central States' motion. We also deny Santa Fe's "request" that we require the arbitrator to use a "sham" standard under *29 U.S.C. § 1392(c)*.

1392(c) in that case; we intended to say that the Sixth Circuit is the only circuit to address the argument that the MPPAA should be analogized to the Tax Code and that it has rejected that argument.